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No. 82-766

In The
# Supreme Court of the United States
October Term, 1982

SECRETARY OF STATE OF MARYLAND,
*Petitioner,*

vs.

JOSEPH H. MUNSON COMPANY, INC.,
*Respondent.*

**ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND**

## BRIEF OF RESPONDENT

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## QUESTIONS PRESENTED

1. Whether a litigant who meets the Article III test of injury in fact, and whose activities are inextricably linked to the constitutional rights of third party charities, may raise those rights in support of a challenge to the constitutionality of a state statute regulating charitable solicitation.

2. Whether a litigant who meets the Article III test of injury in fact, and who demonstrates that a state statute regulating charitable solicitation substantially infringes the First Amendment rights of a class of charitable organizations, may raise the rights of that class in support of a challenge to the constitutionality of that statute.

3. Whether a state statute regulating charitable solicitation is unconstitutionally overbroad under the First and Fourteenth Amendments, where it is shown that the statute substantially affects protected interests, but is neither related to asserted state interests, nor is it the least drastic means by which those interests could be served.

4. Whether a power vested in the Secretary of State by a state statute regulating charitable solicitation, enabling the Secretary to exempt certain groups from the statute's prescriptions, vests the Secretary with excessive discretion, thus rendering the statute unconstitutionally vague.

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## BRIEF OF RESPONDENT

### RESPONDENT'S STATEMENT OF THE CASE

In Petitioner's Statement of the Case, a number of assertions are made with regard to the statute at issue, and to the history of the case. Respondent, the Joseph H. Munson Company, Inc. (Munson), takes exception to several of those assertions, and will correctly set forth below the matters that were inaccurately stated.

#### A. History of the Case

One of the issues heavily relied upon by the State in this cause is that of Munson's standing to challenge §103D. Throughout the proceedings below, and again in its brief,

the State has characterized the oral stipulation agreed to at trial as inadequate to support that challenge. See, *e. g., Br. of Pet.* at 12, 18 (note 12).[1] In fact, the stipulation demonstrates a proper factual basis for this case, and the State, having agreed to the stipulation, cannot now look behind it by denying its contents.

Munson's business in Maryland is as a professional fundraiser counsel; it counsels organizations that desire to raise funds on how best to accomplish their goals, and promotes and operates fundraising campaigns and events. Munson's contracts call for a payment of a percentage of the funds raised by a given event, and this percentage is in excess of 25 percent of the funds raised (net of such expenses as are excluded by the statute). The controversy arose when the groups seeking to contract with Munson for fundraising, the Fraternal Orders of Police (FOPs) of the various counties in Maryland, began to fear criminal prosecution because of Munson's contract terms. Section 103D, by making it a crime to ". . . pay or agree to pay as expenses . . . a total amount in excess of 25% of the total gross raised . . .", subjected those groups to prosecution merely for contracting with Munson.

The various chapters communicated their fear to Munson, indicating that they would cease doing business with the company because of their potential criminal liability.

Munson consulted with counsel, who determined, through conversations with representatives of the State of Maryland, that the statute was being actively enforced. Subsequently, Munson and counsel were informed that the

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[1]Citations to appendices and briefs are abbreviated as follows: Brief of Petitioner—*Br. of Pet.;* Petition for Writ of Certiorari—*Pet.;* Opposition to Writ—*Opp.;* Appendix to Petition for Writ—*APC.*

failure to conform to the statute would result in the State filing criminal charges for the violations.

Because its contracts called for a fee in excess of that permitted by §103D, Munson was faced with the choice of ceasing to do business in Maryland, and thereby losing the entire amount of its revenue in Maryland, or subjecting itself to civil and criminal liability under §103L. An action was then brought against the Secretary of State of Maryland challenging the statute. At the trial held June 16, 1980, Munson was prepared to adduce testimony regarding the controversy and factual basis of the case; however, for reasons of judicial economy, and because all of the relevant facts were undisputed, the parties entered into a five-point stipulation:

> 1. That the Charitable Solicitation Laws contained in Article 41, Section 103, *et seq.* of the *Annotated Code of Maryland* (1978, 1979 Cum. Supp.) which limits the amount that can be allocated for fund raising expenses are generally enforced in the State of Maryland.
>
> 2. That the Fraternal Order of Police, Montgomery County Chapter, (hereinafter referred to as FOP), is reluctant to enter into a contract with the Plaintiff, Joseph H. Munson Co., Inc., (hereinafter referred to as Plaintiff) for promotion of fund-raising events due to the limitation imposed by Article 41, Section 103, *et seq., supra*, that nothing in excess of 25% of the gross income raised through fund raising activities may be expended on fund raising expenses.
>
> 3. That the Plaintiff's contract with the FOP calls for a fee in excess of 25% of the net income raised through fund raising activities.
>
> 4. That the FOP is engaged in the dissemination of information and the advocacy of causes on behalf of police officers.

5. That except for the contractual relationship regarding promotion of fund raising activities, as indicated above in Number 3, there exists no other financial relationship between the Plaintiff and the FOP.

The stipulated facts, while brief, are clear and sufficient to establish the adverse nature of the parties' positions.

They establish, as Munson was prepared to prove, that the fundraising contracts call for a fee in excess of 25 percent of the income raised, *net of all expenses exempted by the statute.* Therefore, under §103D, any group, including the FOPs, would be criminally liable if they contracted with Munson, *as wou'd Munson.*

The stipulation establishes, as Munson was prepared to prove, that the statute in question is generally enforced in Maryland. In other words, the fear of prosecution is not theoretical, but real and substantial.

The stipulation establishes, and Munson was prepared to prove, that the Montgomery County Chapter of the FOP was reluctant to contract with Munson *due to the limitations imposed by the statute.* Despite Petitioner's characterizations, the meaning of this stipulation is clear —because of the statute, Munson stands to lose all of its revenue in the State of Maryland.

The stipulation establishes, and Munson was again prepared to prove, that the FOPs engage in the advocacy of causes on behalf of their member officers, and disseminate information to them and to the public about those causes.

Respondent could easily have adduced testimony proving all of the facts contained in the stipulation, creating a

lengthy record and consuming much judicial time. Petitioner cannot now complain that the record is sparse in the face of its acceptance of the stipulation, and because of the fact that Respondent relied upon the stipulation by not offering testimony at trial. The stipulated facts, mutually agreed to, must be accepted as conclusive on the factual issues to which they pertain.

In a manner similar to its treatment of the stipulation, the State has sought to characterize certain arguments of Munson's as afterthoughts. Specifically, Petitioner asserts that the "local discretion" argument was not made until the case was before the Maryland Court of Appeals. *Br. of Pet.* at 14; *Pet.* at 16. Despite Respondent's clarification in its Opposition to the Writ (Opp. at 5, note 3), the assertion was again made in the State's brief on the merits. Respondent first raised the excessive discretion argument at trial, and in a Memorandum of Law to the trial court. That memorandum can be found in the record of the case, dated July 1, 1980.

Respondent maintains that its argument has remained essentially unchanged since the amended complaint was filed in Circuit Court; however, only the Court of Appeals has been willing to address all of the issues raised.

**B. The Statutory Scheme**

Petitioner in its brief has attempted to characterize the challenged statute, Article 41, Section 103D Annotated Code of Maryland, 1957 (1982 Repl. Vol.), as a "liberal" and "flexible" regulation, one that imposes a "miniscule" burden upon charitable organizations. See, *e. g.*, *Br. of Pet.* at 10. Primarily the State relies upon the exemption

power contained in §103D; that is, the power of the Secretary to:

> "... issue rules and regulations to permit a charitable organization to pay for expenses in connection with a fund-raising activity more than 25% of its total gross income *in those instances where the 25% limitation would effectively prevent the charitable organizations from raising contributions.*" Section 103D(a) (emphasis supplied).

However, it is clear that the Court of Appeals of Maryland has interpreted the exemption power as insignificant—not at all like the broad interpretation the State has urged:

> "... the authorization for exemption regulations in the Maryland statute is *extremely narrow*. The Secretary, in promulgating regulations for permits waiving the 25% expense limitation, is confined to 'those instances where the 25% limitation would effectively prevent the charitable organization from raising contributions.' Article 41, Section 103D." *Munson v. Secretary of State*, 448 A. 2d 935, 946 (1982), *APC* at 20 (emphasis supplied).

The Court went on to point out that the focus of the exemption power, the *ability* to raise funds within the limitations, would not serve to exempt those groups identified as protected in *Village of Schaumburg v. Citizens for a Better Environment*, 444 U. S. 620 (1980).

Therefore, the expansive interpretation of the statute urged by the Secretary since this case began is no longer valid. The highest court of the State of Maryland has authoritatively construed the exemption power to be "extremely narrow," and that interpretation is binding on the State. The State cannot now argue to this Court that the power is broad and flexible; in effect, denying the construction given by the Court of Appeals. Sim-

ilarly, this Court is bound by the construction given a state statute by the highest court of a state. *NAACP v. Button*, 371 U. S. 415, 432 (1963).

## SUMMARY OF ARGUMENT

The Maryland Court of Appeals correctly concluded that Article 41, Section 103D of the Maryland Code was unconstitutionally overbroad in violation of the First and Fourteenth Amendments, and that Respondent was a proper party to challenge the statute.

As evidenced by the oral stipulation agreed to at trial by Respondent and Petitioner, Respondent will be greatly injured by the operation of § 103D. All of Respondent's business in the State of Maryland will be lost, since those contracting with Respondent will be subject to criminal and administrative sanctions. Furthermore, the statute makes Respondent criminally liable for contracts not meeting the requirements of § 103D. Therefore, Respondent has the necessary "injury in fact" to meet the Article III case or controversy requirement for standing.

The activity Respondent wishes to pursue, fundraising, is inextricably linked with Respondent's client charities' rights to combine their advocacy and informational activity with fundraising. In addition, serious obstacles stand in the way of the charities' own assertion of their rights. Very unfavorable publicity would be generated against a charity challenging fundraising regulations. Furthermore, the charities lack the resources necessary to prosecute a court challenge against the statute. There-

fore, Respondent may raise the rights of those charities in support of the challenge.

Section 103D forces charities that combine advocacy and informational activity with fundraising to forego, when choosing an activity, considerations relating to the speech activity. They cannot choose the activity they deem best to promote their views and information, since they must choose the activity with the lowest cost-to-funds raised ratio. Therefore, there exists a substantial class of charities to which § 103D cannot constitutionally be applied. Respondent, having shown injury in fact, may challenge §103D and raise the rights of that class of charities in its support.

Although "prevention of fraud", the main justification for § 103D, is certainly a strong state interest, the statute is insubstantially related to that interest. There is no real relation between a percentage regulation and the existence of charitable fraud. Furthermore, disclosure, publication and penal statutes punish the fraudulent conduct more directly, but with far less drastic effects on speech interests. Therefore, § 103D is unconstitutionally overbroad in violation of the First and Fourteenth Amendments.

The exemption power contained in § 103D, heavily relied upon by the State to save the statute's validity, had been authoritatively construed by Maryland's highest court as far too narrow to account for all of the protected interests infringed by the statute. That construction is binding on the State, and on this Court. Alternatively, even accepting the State's "expanded" version of the power, the statute would still be unconstitutional. By the State's own argument, the Secretary is vested with the

discretion to decide who will be exempted from §103D, and who will not. Such discretion is excessive in a First Amendment context, making the statute invalid.

## ARGUMENT

### I. Munson Has Standing To Challenge Section 103D On Its Face Since It Has Suffered Injury In Fact, And May Raise The Rights Of Maryland Charities In Support Of That Challenge Under The Jus Tertii And Overbreadth Doctrines.

Two of the issues raised by this case concern the limitations imposed upon judicial review by both Article III of the U. S. Constitution as well as by the prudential policies of this Court. They are, first, the issue of Respondent's standing to challenge Section 103D, and second, the right of Respondent to challenge the statute on its face; that is, on the basis of facial overbreath under the First Amendment.

The standing issue concerns Munson's right to challenge the statute at all: whether there is injury resulting from the statute's operation, and whether Munson may raise the constitutional rights of its clients, the Fraternal Orders of Police, in support of its challenge. The overbreadth issue goes further than that. If the elements required for First Amendment overbreadth standing are met by Respondent, then it may raise in support of its challenge the rights of *all* groups adversely affected by the statute. Those are the groups ". . . to which the [statutory] limitations could not be applied consistently with the First and Fourteenth Amendments . . ." *Schaumburg*, 444 U. S. at 634. In other words, if Respondent is en-

titled to overbreadth standing, then there need be ". . . no demonstration that [Respondent] itself was one of those [protected] organizations." *Id.*

As to the choice of law regarding standing, it is clear that the Court of Appeals of Maryland, although it discussed Maryland law extensively, ultimately relied upon federal law in upholding Munson's standing. *APC.* at 7-10 and 11-13 (quoting *Schaumburg,* 444 U. S. at 633). As set forth below, that decision was correct.

**A. Munson Has Standing To Challenge Section 103D Since It Has Suffered Injury In Fact: Loss of Business And Possible Criminal Prosecution.**

The first inquiry with regard to standing is whether the constitutional requirement in Article III is met—whether there exists a "case or controversy". In the case of *Singleton v. Wulff,* 428 U. S. 106 (1976), this Court described the question as ". . . whether the plaintiff-respondents allege 'injury in fact', that is, a sufficiently concrete interest in the outcome of their suit to make it a case or controversy subject to a Federal court's Article III jurisdiction." 428 U. S. at 112. Of course, this requirement, being jurisdictional, must be met by the Respondent.

There is little doubt that Munson has suffered and will suffer concrete injury from the operation of the statute in question. A substantial source of revenue in years past, the FOPs of Maryland, will be cut off because these organizations will not enter into contracts that expose them to criminal liability. On the other hand, if the statute is held to be invalid, Munson will be able to continue to conduct business and generate revenue in Maryland while the State will lose an enforcement power conferred

by its statutes. Just as in *Singleton*, "the relationship between the parties is classically adverse, and there clearly exists between them a case or controversy in the constitutional sense." 428 U. S. at 113.

Furthermore, it cannot be said that the statute is not the "cause" of the injury merely because there are third parties, the FOPs, who actually withdraw their business from Munson. Although the "injury in fact" analysis includes the requirement that the relief sought must remedy the injury complained of, it is clear that that requirement is fulfilled here. See *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U. S. 29 (1976).

Unlike *Simon*, the relief sought in this case would necessarily have a significant effect on Respondent, as well as its third party clients. The FOPs contracted with Munson in prior years, and have every intention of doing so again—if the statute preventing them is invalidated.[2] In other words, *but for* the provisions of §103D, Munson would earn substantial revenue through contracts with the FOPs.

In addition to the obvious economic injury, Munson faces the administrative and criminal penalties contained in Section 103L. They are: (1) cancellation of registra-

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[2]In fact, as cited by Petitioner, Munson has signed contracts with several chapters during 1982. *Br. of Pet.* at 12 (note 9) and 18 (note 12). Contrary to Petitioner's assertions, these contracts do not prove a lack of potential injury; rather, the contracts are the result of counsel's opinion as to the invalidity of the statute, as well as an apparent reluctance on the part of the State to prosecute during the pendency of this case. The contracts do, however, prove that the FOPs will contract with Munson if the challenged statute is invalidated.

tion, (2) civil injunction, and (3) criminal prosecution.[3] There is no doubt that the jeopardy of a criminal prosecution is, by itself, injury sufficient to meet the case or controversy requirement. (cite). Thus there are two distinct injuries resulting from the statute's operation, each fulfilling the "injury in fact" requirement.

Munson has shown that because of the provisions of Section 103D, it will suffer economic loss, and also faces possible administrative and criminal actions; furthermore, that the invalidation of the statute would completely remedy this injury. Therefore, the threshold requirement of Article III, that there exist a "case or controversy", has been fully met in this action by Munson's demonstration of "injury in fact."[4]

**B. Munson May Raise The Rights Of Maryland Charities In Support Of Its Challenge Under The Jus Tertii And Overbreadth Doctrines.**

Munson's relationship with the FOPs raises another standing issue: Munson's right to raise, in support of its challenge, the constitutional claims of parties not before the Court (hereinafter referred to as "third-party standing"). Even though Munson has clearly demonstrated injury from the statute, and therefore has the right to challenge it, "ordinarily, one may not claim standing in this Court to vindicate the constitutional rights of some third party." *Barrows v. Jackson*, 346 U. S. 249, 255 (1953).

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[3]The characterization of these provisions by the State as "the *only* penalties for violating § 103D" is very surprising, considering their great impact upon fundraising organizations. *Br. of Pet.* at 8 (emphasis supplied).

[4]Although asserting that injury to Munson is merely "possible", the State concedes that Munson has the requisite injury to meet the Article III limitation. *Br. of Pet.* at 18 (note 12).

It has been often said that the rule against third-party standing, unlike the case or controversy requirement, is not constitutionally mandated, but rather, prudential in its source. *Craig v. Boren*, 429 U. S. 190, 193 (1976). This is not to say that the rule does not have very strong policy reasons behind it (see *Singleton*, 428 U. S. at 113-114), but rather, "like any general rule, this one should not be applied where its underlying justifications are absent." *Id.* at 114.

Consequently, this Court has developed two very limited exceptions to the general third party standing rule for situations where either the underlying justifications are absent, or where competing policies outweigh those justifications. The first exception is based upon the relationship of the party before the court, and the activity that party seeks to pursue, to the person holding the legal right sought to be asserted. This is the so-called *jus tertii* exception to the traditional doctrine of federal standing. Where the relationship of the litigant to the third party is such that " . . . the enjoyment of the right is inextricably bound up with the activity the litigant wishes to pursue . . . ", this Court has permitted a litigant to assert the rights of third persons not before the Court. *Singleton, supra*, 429 U. S. at 114. The expanded standing is permitted because the two primary policy considerations against third party standing, unnecessary adjudication and possibly ineffective advocacy, are simply not present under such circumstances. *Id.* at 115.

The second exception is for litigants challenging a statute on the grounds of First Amendment facial overbreadth. Because First Amendment freedoms are so jealously guarded, this Court has determined that the

policy considerations in favor of allowing expanded standing in such cases outweigh those against it. See, *e. g.*, *Bigelow v. Virginia*, 421 U. S. 809 (1975).

The result of qualifying for either of the two exceptions is usually the same: as long as there has been demonstrated injury in fact, a litigant may raise the rights of third persons not before the court in support of its claim. However, there is a great difference in the scope of the two exceptions. Under *jus tertii* standing, the litigant is limited to raising the rights of those particular third parties with whom his relationship has earned him the expanded standing. Such a litigant would be asserting the rights of designated persons. On the other hand, a litigant with overbreadth standing may raise the rights of all persons whose First Amendment rights are adversely affected by the challenged statute; in effect, the litigant may assert the rights of what in essence are undesignated persons. See *Schaumburg*, 444 U. S. at 634.

The distinction may not be necessary in order to decide the question of standing, however, since it is Respondent's position that it satisfies both of the exceptions — *jus tertii* and overbreadth.

**1. The relationship between Munson's activities and the rights of the FOPs is sufficient to permit Munson to raise those rights in support of its challenge.**

This exception to traditional standing doctrine is based upon the relationship between the litigating party and third parties not before the Court. As noted earlier, the reason for this exception is that when there is a sufficient relationship between the litigant and the third

party, the policy considerations underlying the general rule against third party standing are absent.

This Court has stated those policy considerations to be, first, the desirability of avoiding unnecessary adjudication of constitutional rights, and second, that third parties are presumed to be the best proponents of their own rights. With regard to the former, it may be that the holders of those rights are able to enjoy them whether or not the litigant is successful. In that case, a court's construction of those rights would be unnecessary. *Singleton, supra,* 428 U. S. at 114.

As to the latter, this Court relies upon the advocacy of the parties before it to properly decide a case, and wishes to have the most desirable advocates as parties. The third parties may also prefer to assert their own rights, since they will be bound by a decision under the doctrine of *stare decisis. Id.* at 114.

To determine whether those policy considerations are present in a given case, the Court has established a factual test to aid its inquiry. The test is the nature of the relationship between the litigant and the third party. "If the enjoyment of the right [by the third party] is inextricably bound up with the activity the litigant wishes to pursue, the court at least can be sure that its construction of the right is not unnecessary. . . ." *Id.* In other words, if the right depends on the activity litigated, then a decision on the activity would certainly affect the enjoyment of the right.

In the case at bar, Munson's activity provides the FOPs with the ability to choose the fundraising methods they deem most appropriate to their advocacy and infor-

mational activities. See Section II and III, *infra*. These methods, being more expensive relative to the funds raised, would be cut off if Munson's challenge fails. The FOPs would be forced to limit their advocacy activities (the constitutional right), because of the ban against Munson's activity. It is clear that adjudication of the right is not unnecessary, since enjoyment of the right would be greatly affected by the success or failure of Munson's challenge.

In addition, the Court has sometimes looked to " . . . the ability of the third party to assert his own right." *Singleton*, 428 U. S. at 115. This test enables the Court to determine whether the third party's absence suggests that his right is not actually at stake (making its adjudication unnecessary), or whether, because of some "genuine obstacle" to the third party's involvement, the litigant is " . . . the right's best available proponent." *Id.* at 116.[5]

The obstacle to the third party litigating its own rights need not be so large as to make it impossible, or even nearly so. All that is required is a showing that the third party has been somehow discouraged, in a practical sense, from participation in the litigation. See *Singleton*, 428 U. S. at 116 (note 6).

Thus, in *Singleton*, the obstacle to the woman's assertion of her own rights was the fact that " . . . she may

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[5]While Respondent asserts that it meets this second test, as set forth below, it is also asserted that this additional test is no longer required under *Craig v. Boren*, 429 U. S. 190 (1976). In that case, beer sellers were given third party standing to challenge a discriminatory drinking age, even though the third parties (males, age 18-20) could have easily litigated the issue. The Court made no mention of this second test.

be chilled from such assertion by a desire to protect the very privacy of her decision from the publicity of a court suit." *Id.* at 117. Clearly, the obstacle need not be insurmountable. Indeed, as noted in *Singleton*, the woman could have brought suit under a pseudonym. *Id.* There need only be some factual basis for not presuming that the third party's absence means that the right will be unnecessarily adjudicated.

In the instant case, a very similar obstacle stands in front of the FOPs' participation in this litigation. Because of the very statute being challenged, titled the "Maryland Charitable Organizations Law", and because the law was passed in response to the Pallotine Fathers scandal (an allegedly fraudulent charitable solicitation activity; see *Br. of Pet.* at 11 (note 8)), FOP participation in the litigation would surely raise a question among donors as to their financial trustworthiness. It is likely that the average citizen would conclude that the FOPs were attempting to evade State regulation, when in fact, they were merely attempting to protect their First Amendment rights.

Furthermore, charitable organizations such as the FOPs lack the financial capability to prosecute such costly litigation, and are thus hindered in vindicating their rights.

Therefore, serious obstacles stand in the way of FOP participation: the risk of losing their charitable financial support, and the enormous resources required for the challenge. For these reasons, and because of the fact that the FOP's rights would be "diluted or adversely affected" if Munson's challenge fails, Munson is per-

mitted to assert the rights of the FOPs in support of its claims.

**2. Because Munson is challenging Section 103D as facially invalid under the First Amendment, Munson may raise the rights of Maryland charities in support of that challenge.**

Although *jus tertii* standing is certainly a sufficient basis for Munson's challenge, there exists an even stronger basis — one that is more related to the underlying issues of the case: First Amendment overbreadth standing. The basis for Munson's right to third party standing under the overbreadth exception is best stated by this Court in *Schaumburg*, ~~444~~ U. S. at 634:

> "Given a case or controversy, a litigant whose own activities are unprotected may nevertheless challenge a statute by showing that it substantially abridges the First Amendment rights of other parties not before the court. [citing cases]."

In other words, a litigant who meets the Article III (case or controversy) test of injury in fact, and whose claim is based upon a statute's overbroad reach into First Amendment interests, will not be limited by the general rule against third party standing; this Court will permit the challenge on the basis of the rights of parties not before the Court.

This expanded standing means not only that Respondent can raise third party rights in its challenge, but also that the State may not defend the statute on the basis of the particular status or characteristics of either Munson or the FOPs. Yet, in its brief, the State asserts that overbreadth standing is unavailable because the FOPs do not engage in advocacy activities (*Br. of Pet.*

at 24 (note 16)), and because Munson's activities bear no relation to those "alleged advocacy activities." *Id.*[5]

The State even goes as far as comparing the *Schaumburg* case, stating that the challenger in that case " . . . had established a relationship between its advocacy and its fund raising . . . " *Br. of Pet.* at 25. Although the Citizens for a Better Environment (CBE) had asserted their protected status as an alternative ground, it is absolutely clear that CBE's particular status and characteristics were irrelevant to the resolution of that case. As recounted by Justice White:

> " . . . The District Court made no findings with respect to the nature of CBE's activities; and the Court of Appeals expressly stated that the facts with respect to the internal affairs and operations of the organization were *immaterial to a proper resolution of the case.* The Village claims, however, that it should have had a chance to prove that the 75 percent requirement is valid as applied to CBE because CBE spends so much of its resources for the benefit of its employees that it may appropriately be deemed an organization existing for private profit rather than for charitable purposes.
>
> "We agree with the Court of Appeals that CBE was entitled to its judgment of facial invalidity if the ordinance purported to prohibit canvassing by a substantial category of charities to which the 75 percent limitation could not be applied consistently with the

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[5]The State goes on to refute certain elements of Munson's demonstrated injury in fact (no threat of prosecution and no loss of business) despite having conceded to these injuries just six pages earlier. *Br. of Pet.* at 25. Of course, the claim of failure to exhaust administrative remedies is irrelevant to the issue of overbreadth standing. *Id.* See *Lovell v. City of Griffin*, 303 U. S. 444 (1938) and *Thornhill v. Alabama*, 310 U. S. 88 (1940).

> First and Fourteenth Amendments, *even if there was no demonstration that CBE itself was one of these organizations.*" 444 U. S. at 633-634 (footnote omitted, emphasis supplied).

Clearly, then, Munson's status is not the issue here, and neither is the status of the FOPs.[7] What First Amendment overbreadth standing provides is the ability to raise the constitutional rights of *all* members of the class of organizations identified as protected from the reach of the challenged statute.

Respondent, in Section II below, has identified a substantial class of organizations to which the restrictions of §103D cannot constitutionally be applied. Where this threshold requirement is met, the policy considerations underlying the general ban on third party standing are far outweighed by "... the transcendent value to all society of constitutionally protected expression." *Bigelow, supra,* 421 U. S. at 816. The fear is that the mere existence of such an overbroad statute will inhibit the exercise of rights protected by the First Amendment. For these reasons, the Court permits the challenge to be made even by one whose conduct could be validly regulated by a more narrowly drawn statute. As stated in *Bigelow:*

> "We give a defendant standing to challenge a statute on grounds that it is facially overbroad, regardless of whether his own conduct could be regulated by a more narrowly drawn statute, because of the 'danger of toleration, in the area of First Amendment free-

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[7]Like CBE, we assert that the FOPs are engaged in substantial advocacy and informational activities as an alternative position, and object to the State's continual denial of the conclusiveness of the agreed upon oral stipulation. See Respondent's Statement of the Case.

doms, the existence of a penal statute capable of sweeping and improper applications.' *NAACP v. Button*, 371 U. S. at 433." 421 U. S. at 816.

The State also contends that the overbreadth analysis is "attenuated" by the fact that "conduct and not merely speech is involved." *Br. of Pet.* at 24. The State cites *Broadrick v. Oklahoma*, 413 U. S. 601 (1973), for the proposition that where conduct is involved, "the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Id.* at 615. In effect, the State is arguing that the proper analysis of this case is under the "speech-plus" doctrine of this Court.[8] See *United States v. O'Brien*, 391 U. S. 367, 376 (1968).

Respondent asserts that while solicitation involves conduct other than speech, it is so uniquely connected with that speech as to make the traditional speech-plus doctrine inapplicable. Petitioner's exact argument was characterized by this Court as ". . . a far too limited view of our prior cases relevant to canvassing and soliciting by religious and charitable organizations." *Schaumburg, supra*, 444 U. S. at 628. In fact, this Court has, for all practical purposes, equated charitable solicitation with speech. "Canvassers in such contexts are necessarily more than solicitors for money." *Id.* at 632. "It is clear that [charitable solicitations] are . . . within the protections of the First Amendment." *Id.* at 633.

Thus, the conduct and speech elements are not realistically severable, as they are in the speech-plus cases, pri-

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[8]The *amici* represented by the Commonwealth of Massachusetts also rely on this argument. See *Brief of Amici* at 14-18.

marily because the speech is so dependent upon the solicitation element for its existence. *Id.* at 632. Respondent therefore asserts that it need not satisfy the more stringent speech-plus requirement set forth in *Broadrick;* however, it is also asserted that in any event, that requirement is met here.[9]

Because Munson has demonstrated injury in fact, and because this challenge to § 103D is on the basis of facial overbreadth under the First Amendment, Munson may, in support of its challenge, raise the rights of those organizations identified as protected from the unconstitutional sweep of the statute. We now turn to the task of identifying that class of organizations.

**II. There Exists A Substantial Class Of Charities To Which Section 103D Cannot Be Applied Consistently With The First And Fourteenth Amendments.**

As was the case in *Schaumburg,* there exists a class of charitable organizations whose primary goals involve advocacy and information gathering and dissemination, rather than direct services to the truly needy. 444 U. S. at 635. Since these organizations combine their fundraising efforts with advocacy and communication to prospective donors and others, they will incur substantially higher expenses, very likely in excess of the 25 percent limit placed on them by § 103D. Ironically, as more effort is spent on speech related activities (necessarily taking away effort from the pure fundraising aspects), the more it is likely that a group will exceed the statutory spending limit. It is this class of organizations " . . . to which the [statute] could not be applied consistently with the First

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[9]See Section IIIA, *infra.*

and Fourteenth Amendments . . . " *Schaumburg*, 444 U. S. at 634.

Essentially, this class is the same as the one identified in *Schaumberg*, 444 U. S. at 635. However, since the Maryland Statute is broader in scope, the analysis is slightly different, and therefore the class of organizations is different.

An organization that raises funds through "events" or direct mail and telephone campaigns, as well as through canvassing, trying to attract groups of supporters, must also qualify under the Maryland percentage limitations. It is logical to assume that the more popular a cause is, the more funds that will be raised in its behalf, and therefore, the lower its fundraising cost *per* dollar will be. Conversely, the less popular causes will, by the same logic, necessarily have a higher "cost-to-funds raised" ratio. Under § 103D, therefore, the class of organizations to which the percentage limitation cannot be constitutionally applied is most likely to include advocacy-type organizations whose views are relatively unpopular. Minority views simply cost more to advocate.

The State overlooks what is, in essence, the determinative fact of this case when it argues that there has been no ". . . demonstration that the organizations will not be able to obtain the same services from others at a fee permitted under Section 103D." *Br. of Pet.* at 23. This argument assumes that a charitable organization's only consideration when choosing a fundraising method is its cost and likely return. If this were so, percentage limitation statutes would not be so objectionable.

Those organizations that combine fundraising with speech activities must consider, besides cost, the appropri-

ateness and efficiency of the activity in advocating and disseminating its views and information. The activity chosen must be appropriate to the nature, message and goals of the particular organization. Some organizations, local in character, might use canvassing and handbills throughout a neighborhood. Others, more national in scope, might use direct mail or newspaper advertising. What is clear is that cost and expected return is not the sole, or even the primary consideration of a substantial number of charitable groups.

Nevertheless, § 103D requires those charitable groups to limit their considerations to the cost-to-funds raised ratio, or face administrative and criminal sanctions. Regardless of whether a permit is a condition precedent or not,[10] it is a direct and substantial infringement upon the First Amendment rights of an organization for a statute to dictate the form and content of the group's advocacy and informational activities. Rather than being a "neutral, noncensorial" regulation, as contended by the State, § 103D allows the State to differentiate among organizations solely on the basis of the organization's choice of activities; *i.e.*, its content.

Because of its content-based regulation of First Amendment activity, the statute cannot be applied to any group that engages in speech activity. Furthermore, it is

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[10]The issue of a "prior restraint" is a false issue in this case. There is little practical difference between a statute that requires a permit in advance, and a statute that places criminal penalties on protected activity. The "chill" on First Amendment rights resulting from the latter is as effective a prior restraint as an actual permit requirement, and just as unconstitutional. See *Chaplinsky v. New Hampshire*, 315 U. S. 568, 572 (note 3) (1942).

obvious that a large percentage of charitable groups engage in activities that combine fundraising with advocacy, and therefore fall into the class of groups to which the Maryland statute cannot constitutionally be applied.

Because there exists such a substantial category of such organizations; because the natural effect of a percentage limitation is to favor popular causes over less popular ones; and because organizations have considerations other than cost when choosing their activities, Respondent is permitted to challenge § 103D on the basis of facial overbreadth ". . . even if there was no demonstration that [Respondent] itself was one of these organizations". *Schaumburg*, 444 U. S. at 634 (footnote omitted).

The exemption power contained within § 103D does not affect Munson's entitlement to overbreadth standing. The power granted to the Secretary is, by its very wording, far too limited to have any constitutional significance.[11] To cure the apparent overbreadth, the exemption power must provide for each member of that class of organizations previously identified as protected under the First Amendment. However, the exemption power looks not to the nature of the organization, or to the type of activity it engages in, or even to the reasonableness of its expenses; rather, it looks to whether the organization would be *precluded* from fundraising if it were forced to adhere to the 25 percent limitation. There is a very narrow and specific focus that has no relation to the advocacy nature of an organization. There is no valid construction of the

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[11]Respondent has already noted the effect of the narrow construction given the exemption power by the Court of Appeals. See Respondent's Statement of the Case.

power that would alter its focus to those factors that identify protected activity.

Giving the words of the exemption power their plain and ordinary meaning, the Secretary is vested with the rather limited and defined discretion to determine whether an organization would be "effectively prevented" from raising funds by *any* method under a 25 percent limitation. As noted by the Maryland Court of Appeals, this Court "did not limit its concern [in Schaumburg] to organizations which could not raise contributions without exceeding the 25 percent expense limitations." APC at 21. The real focus of the exemption is on the ability to raise funds, not the type or reasonableness of expenditures.

With the exemption power in mind, the question is whether there still exists a class of organizations to which § 103D cannot be applied. The answer is still yes. Because of the narrow focus of the exemption, it is unlikely that any of the protected class members could avail themselves of it. Consider a typical organization. It may be over the 25 percent limit when it chooses the activities best suited to its advocacy and informational goals, but it might just as easily cut down on advocacy and increase fundraising aspects, or change the type of fundraising activities, or do any number of things that would bring it into the 25 percent rule. If it *could,* in any way, bring those expenses down, it would then be ineligible for an exemption, not being without any means of raising funds under a 25 percent ceiling (in other words, not "effectively prevented"). But it would have had to fundamentally alter its methods from the types and mix of activities that it deems most effective for its advocacy and informational activities. It may have to cut expenses by reducing staff,

or reaching less people. The effect of the statute would be to limit the number or type of issues confronted, or its effectiveness in dealing with any of them.

Thus, the statute, even with the exemption power, leaves a class of organizations to which the statute cannot be applied consistently with the First Amendment. It is also clear that the Maryland statute, although not a "prior restraint" by its terms, nevertheless exerts a "chilling effect" on speech interests because of its overly broad reach, and because the exemption power is so unrelated to the protected interests of those organizations.

It is because of this chilling effect that facial overbreath challenges are permitted:

> "In these First Amendment contexts, the courts are inclined to disregard the normal rule against permitting one whose conduct may validly be prohibited to challenge the prescription as it applies to others because of the possibility that protected speech or associative activities may be inhibited by the overly broad reach of the statute." *Schaumburg,* 444 U. S. at 634.

This Court is not inclined to require persons exercising their First Amendment rights to choose between risking criminal sanctions or steering far clear of the statute's reach; in effect "self-censoring" to avoid the expense and risk of prosecution. The Maryland Court of Appeals relied on this very point when it found that there is little practical difference between the actual prior restraint of permit denial (as in *Schaumburg*), and the effective prior restraint that results from the threat of criminal sanctions. "It would seem that the difference . . . is purely a semantic one." *Munson v. Secretary of State,* 424 A. 2d 935, 944 (1982), *APC.* at 17. "We do not believe that . . . there

is any merit in the distinction drawn by the Secretary between "prior restraint" of a form of speech and criminal sanctions for engaging in a form of speech." 424 A. 2d at 945, *APC.* at 18.

A case-by-case process of shaping § 103D's "permissible coverage" (the alternative to facial analysis), even if possible, is not beneficial to protected speech interests. Such a process would suspend freedoms for an indefinite period, and permit intimidation of protected activity by the overbroad scope of the statute. See Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844, 875 (1970).

Because of the existence of a substantial class of organizations to which the statute cannot constitutionally be applied, the inquiry in this case must be on the basis of the facial validity, under the First Amendment, of Section 103D.

**III. Section 103D Is An Unconstitutional Infringement Upon First Amendment Rights, Since It Is A Substantial Limitation On Protected Activity, But Is Neither Sufficiently Related To Asserted State Interests, Nor Is It The Least Drastic Means By Which Those Interests Could Be Served.**

Respondent's primary challenge to the statute is that it is unconstitutionally overbroad in violation of the First and Fourteenth Amendments. That is, the statute substantially intrudes upon protected speech interests, but is neither substantially related to asserted state interests, nor is it the least drastic means by which those interests could be served.

Respondent further asserts that the exemption power contained in the statute is far too narrow to be constitu-

tionally significant, and therefore does not save § 103D from overbreadth. As an alternative argument, however, Respondent contends that should the exemption power be viewed to be a much broader grant of authority to Petitioner (as the State suggests), such authority itself is objectionable as creating excessive local discretion in the hands of enforcement officials. In that case, the statute would still be unconstitutional, since the exemption power (even with the regulations issued thereunder) permits too much discretion for it to be valid in a First Amendment context.

The "overbreadth" prong of Respondent's argument primarily relies upon this Court's decision in *Schaumburg, supra*. However, there are differences between the ordinance at bar in that case and the Maryland statute. First, § 103D is substantially broader in its scope. It covers *all* fundraising by charitable organizations, while the Village ordinance is limited to ". . . door-to-door solicitation or the use of public streets and public ways." Schaumburg Village Code § 22-20. Consequently, the statute has a far greater effect on an organization's operations, and thereby its exercise of First Amendment rights.

Second, the Maryland Statute contains an exemption power that authorizies the Secretary to permit non-conforming groups to raise funds under certain limited circumstances. The Secretary has consistently argued that this power is sufficient to save the Statute from constitutional infirmity, while it is Respondent's contention that the power is too narrow to be so effective. In addition, as noted earlier, the Maryland Court of Appeals has agreed with Respondent's interpretation of the exemption power:

that it is "extremely narrow." *APC.* at 20. See Respondent's Statement of the Case.

The constitutional significance of these two provisions is the focal point of this case. However, it should be noted that Respondent relies not only on the *Schaumburg* overbreadth analysis, but also on the "local discretion" analysis of cases such as *Schneider v. Irvington*, 308 U. S. 147 (1939), and *Hynes v. Mayor of Oradell*, 425 U. S. 610 (1976). With that in mind, we turn to the specific arguments advanced by Respondent.

**A. Section 103D Is A Substantial Limitation On Protected Activity.**

Before attacking a statute as overbroad in violation of the First Amendment, a preliminary issue must be dealt with. This issue, always a threshold question in a First Amendment challenge, is whether the statute involved actually affects substantially those interests protected by the First and Fourteenth Amendments.

The activity sought to be regulated by the Maryland statute is public fundraising by charitable organizations. This Court has held that charitable solicitation ". . . is within the protections of the First Amendment." *Schaumburg*, 444 U. S. at 633. Although state regulation may appear to concern only the appeal for funds, and not the speech activity itself, such regulation affects speech interests that are inextricably linked to the solicitation. As noted earlier, to say that the statute's overbreadth is insubstantial because it regulates "only" soliciting is to take ". . . a far too limited view of our prior cases relevant to canvassing and soliciting by religious and charitable organizations." *Id.* at 628.

Charitable solicitation involves several speech interests; among them are: communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes. For this reason, any regulation of solicitation must take into account:

> ". . . the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues, and for the reality that without solicitation the flow of such information and advocacy would likely cease." *Id.* at 632.

Therefore, charitable fundraising is linked with speech interests in two ways. First, solicitation is based upon appeals for support, that support to be in the form of money. The political and economic structure of the United States relies very heavily upon "grassroots" fundraising methods whereby citizens cast economic votes of dollars to the causes that they support. Consequently, the appeal for funds is not just riding along with the appeal for support —it *is* the appeal for support. Furthermore, that appeal necessarily involves dissemination of views and information, as well as advocacy of causes.

Second, this Court in *Schaumburg* took note of the economic reality that without solicitation, the speech activity (advocacy and information dissemination) would likely cease.

Such activity, whether intertwined with solicitation, or economically supported by it, is protected activity under the First Amendment. It does not become unprotected by being in the form of a solicitation to contribute money. *Id.* at 633. See *Bates v. State Bar of Arizona*, 433 U. S. 350 (1977).

Finally, this case does not involve purely commercial speech, since charitable solicitation is not merely concerned with private economic decisions (the cost and characteristics of goods and services). Although the First Amendment is applicable to such speech, the distinction remains relevant for purposes of the overbreadth doctrine. *Schaumburg*, 444 U. S. at 632.

Based upon those authorities, it is clear that the Maryland statute directly affects substantial First Amendment rights, and there is no serious argument to the contrary.

Respondent has also established that it is a proper party to challenge the statute, and that Respondent can raise the rights of persons not before the Court in support of that challenge. It has also been established, by identifying a class of organizations to which the spending limitation cannot constitutionally be applied (despite the exemption power contained in Section 103D), that the challenge may proceed on the basis of the statute's facial validity.

With those threshold questions answered, the underlying issue becomes apparent: whether the State of Maryland, in enacting Section 103D, exercised its power to regulate solicitation in a manner that infringes upon First Amendment rights.

Because of the nature of the exemption power, and because of the claims the State makes regarding that power, it is necessary to answer this issue in two parts. First discussed will be whether the exemption power has any effect at all on the statute's obvious overbreadth. In other words, whether the power enables the State to regulate solicitation without violating the First Amendment, as the State claims it does.

The second discussion is relevant only if the exemption power proves to be up to the task of curing the statute's overbreadth. For even if the exemption power is found to be sufficient to save § 103D in an overbreadth context, Respondent contends that such a power would place excessive discretion in the hands of the Petitioner, and is therefore itself objectionable.

### B. Section 103D Is Insufficiently Related To Asserted State Interests, And Is Not The Least Drastic Means By Which Those Interests Could Be Served.

Where a statute substantially affects First Amendment freedoms, as does § 103D, a heavy burden is placed upon the State. For the statute to be valid, the State must show that it is "necessary" to effect a "strong, subordinating" state interest. "Necessary" means that the statute must be substantially related to the proffered state interests, and that there must not be any means with less drastic effects on speech that would serve those state interests.

Respondent contends that Section 103D (indeed, almost any percentage limitation statute) is insufficiently related to state interests to justify its very substantial intrusion upon protected speech interests. Furthermore, even if the statute was so related, there exist other, far less intrusive (and probably more efficient) means by which the state interests could be accomplished.

As was done earlier in this brief, with regard to standing, the Maryland statute will first be analyzed without the exemption power, then analyzed with that power, in order to determine the effect, if any, that the power has on the analysis.

Excluding the exemption power, the statute would be unquestionably unconstitutional, for it would be a near carbon copy of the ordinance struck down in *Schaumburg*: a simple, 25 percent limitation on fundraising costs. The *Schaumburg* ordinance failed because it could not meet any of the elements recited above. It was overbroad (sweeping protected activity within its ambit), it was insubstantially related to the asserted state interests, and, especially emphasized in the opinion, it was not the least drastic means available to serve those interests. This Court, in analyzing those elements, and concluding that the proffered justifications for the spending limit were inadequate, stated:

> "Prevention of fraud is the Village's principal justification for prohibiting solicitation by charities that spend more than one-quarter of their receipts on salaries and administrative expenses. The submission is that any organization using more than 25 percent of its receipts on fundraising, salaries, and overhead is not a charitable, but a commercial, for-profit enterprise and that to permit it to represent itself as a charity is fraudulent. But, as the Court of Appeals recognized, this cannot be true of those organizations that are primarily engaged in research, advocacy, or public education and that use their own paid staff to carry out these functions as well as to solicit financial support. The Village, consistently with the First Amendment, may not label such groups 'fraudulent' and bar them from canvassing. . . . Nor may the Village lump such organizations with those that in fact are using the charitable label as a cloak for profitmaking and refuse to employ more precise measures to separate one kind from the other. The Village may serve its legitimate interests, but it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms.

citations omitted). 'Broad prophylatic rules in the area of free expression are suspect. Precision of regulation must be the touchstone. . . .' *NAACP v. Button*, 371 U. S. 415, 438 (1963). (citations omitted).

"The Village's legitimate interest in preventing fraud can be better served by measures less intrusive than a direct prohibition on solicitation. Fraudulent misrepresentations can be prohibited and the penal laws used to punish such conduct directly. *Schneider v. State*, 308 U. S. at 164; *Cantwell v. Connecticut*, 310 U. S. at 306; *Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U. S. at 771 (1976).[a] Efforts to promote disclosure of the finances of charitable organizations also may assist in preventing fraud by informing the public of the ways in which their contributions will be employed.[b] Such measures may help make contribution decisions more informed, while leaving to individual choice the decision whether to contribute to organizations that spend large amounts on salaries and administrative expenses.

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444 U. S. at 636-638 (some footnotes omitted).

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"[a] The Village Code, for example, already contains direct proscriptions of fraud by commercial solicitors. Section 22-12 of the Village Code makes it 'unlawful for any peddler of solicitor to cheat, deceive or fraudulently misrepresent, whether through himself or through an employee, while acting as a peddler or solicitor in the village. . . .' Unlike the situation in *Ohralik v. Ohio State Bar Association*, 436 U. S. 47 (1978), where we upheld disciplinary action taken against an attorney who solicited accident victims for the purpose of obtaining remunerative employment, charitable solicitation is not so inherently conducive to fraud and overreaching as to justify its prohibition.

"[b] Illinois law, for example, requires charitable organizations to register with the State Attorney General's Office and to report certain information about their strucure and fundraising activities. Ill. Rev. Stat., ch. 23, § 5102(a) (1977)."

Turning to the Maryland statute, it is clear that the same analysis applies. The prevention of fraud is again the main justification for the limitation,[12] and it is just as true in Maryland as in Illinois that a percentage limitation "only peripherally" promotes that asserted justification. 444 U. S. at 636. When the class of organizations affected by the statute includes those organizations identified as protected, it is simply not true that spending greater than 25 percent of receipts on expenses is necessarily fraudulent. The violator may merely be advocating an unpopular point of view, or may just put so much emphasis on advocacy that its expenses are high relative to the funds generated. On the other hand, an organization could conceivably be misappropriating up to 25 percent of funds raised and still be within the statute.

Simply put, because an organization has other considerations besides cost and likely return when choosing a fundraising activity (and, indeed, it is their First Amendment right to consider those other factors that relate to their speech activity), the resulting percentage cost of raising funds has absolutely no relationship to actual fraudulent or deceptive behavior.

Since percentage requirements are so insubstantially related to the governmental interests proffered here, the

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[12]The *amici*, through the Commonwealth of Massachusetts, have sought to expand the governmental interests asserted in support of percentage regulation. *Brief of Amici* at 3-5. However, it is clear that the asserted interests are merely different ways of saying "prevention of fraud" (e. g., ". . . to prevent breaches of trust . . .", *Id.*).

State cannot carry its burden, and, for this reason alone, § 103D is unconstitutional.[13]

Upon analyzing the other requirement, the "least drastic means" test, a similar result is reached. In *Schaumburg,* this Court noted several methods that would be much more effective in serving the state interest, while at the same time less intrusive on the First Amendment. First, the Court expressly approved disclosure statutes, designed to contribute to informed decision-making by disclosing financial information, yet leaving the ultimate decision whether to contribute where it belongs—with the individual. 444 U. S. at 638.

Second, the state can always punish *actual fraudulent conduct* (misappropriation, etc.) by charities under the penal laws. *Id.* at 637.

Finally, and most importantly, this Court has demonstrated a clear preference for statutes that allow individuals to act as their own censors rather than vesting a state official with the power to censor on their behalf. The Court cited with approval provisions of the Schaumburg Village Code allowing *individual* homeowners to bar solicitors by posting appropriate signs, again leaving the decision to the individual. See *Rowan v. Post Office Dept.,* 397 U. S. 728 (1978); *Martin v. Struthers,* 319 U. S. 141, 148 (1943); cited at 444 U. S. 639.

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[13]There is no doubt that the interests asserted by the State and the *amici* are sufficiently strong. The real issue, however, is whether the means chosen (percentage regulation) further those interests so substantially as to justfy their great burden on First Amendment rights.

Nothing in the Petitioner's brief suggests that any of these alternatives to percentage limitation are not equally applicable to Section 103D of the Maryland code, and Respondent urges that because of these readily available, less burdensome, and more effective means, the Maryland statute cannot be upheld.[14]

**IV. The Exemption Power Contained In Section 103D Does Not Save The Statute's Validity, Since It Is Far Too Narrow In Scope; Alternatively, If Viewed Broadly, The Power Vests Excessive Discretion In State Officials, Making It Unconstitutionally Vague.**

The next step is to consider whether the exemption power changes any of these conclusions. As discussed earlier, it is Respondent's contention that the power is very limited and strictly defined. In our view, it is facially clear that the criterion for an exemption is the ability of the group to raise funds in *any* manner. This criterion has as little to do with the advocacy nature of a 'protected' organization as does the spending limitation have to do with prevention of fraud—almost zero. In other words, the exemption is perfectly clear from a vagueness standpoint, but for the same reasons, it is constitutionally insignificant from an overbreadth standpoint.

As noted earlier, the exception power focuses on the ability to raise funds, only one of the considerations taken into account by an organization seeking to combine fundraising with advocacy and informational activity. The activity chosen by the group as best serving its sub-

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[14]We note that Petitioner failed to address the "least drastic means" issue in its brief.

stantive goals will rarely be the activity with the lowest cost-to-funds ratio. A group seeking an exemption because its choice of advocacy oriented activity will not meet the 25 percent limitation, rather than because of a simple inability to raise funds, will not be eligible for that exemption. In fact, it is interesting to note that the "variety of reasons" for which the State has granted waivers of the 25 percent rule all relate to fundraising ability, not the advocacy or informational nature of the activity. *Br. of Pet.* at 33.

That criterion cannot possibly encompass all of the groups within the identified 'protected class', and therefore, the exemption does not cure the statute's overbreadth. Nor is it possible, by any reasonable construction of the exemption power, to conclude that a percentage limitation with that power is any more substantially related to the prevention of fraud than one without that power. In fact, assuming the power allows greater numbers of fundraisers to operate, there will be a statistical increase in the chance for a fraudulent group operating in the state. Finally, the multitude of less drastic measures mentioned earlier are, of course, still available. It is clear, therefore, that the exemption power, if given its plain and ordinary meaning, cannot save the Maryland statute.

The conclusion to be reached from this analysis is the same as was reached in *Schaumburg*. That is, 'proxy'-type laws (those which use one characteristic, *i. e.*, spending percentage, as a substitute (proxy) for another characteristic, *i. e.*, fraudulent behavior) are, at least in the area of the First Amendment, impermissible. Such laws

are simply insufficiently precise to pass muster in a First Amendment context. *NAACP v. Button*, *supra*, 371 U. S. at 438.

The only thing that can be said in support of percentage statutes is that they are easy to enforce. In a First Amendment context, that is not enough. The answer to the efficiency argument was best given by this Court in *Schneider v. Irvington*, 308 U. S. 147, 164 (1939), (quoted in *Schaumburg*, 444 U. S. at 639), where it is stated:

> "Frauds may be denounced as offenses and punishable by law. Trespasses may similarly be forbidden. If it is said that these means are less efficient and convenient than bestowal of power on police authorities to decide what information may be disseminated from house to house, and who may impart that information, the answer is that considerations of this sort do not empower a municipality to abridge freedom of speech and press."

For these reasons, Respondent asserts that it has demonstrated that the conclusion of the Maryland Court of Appeals was correct: that Section 103D is unconstitutionally overbroad in violation of the First and Fourteenth Amendments.

However, the State raises the argument in its brief that the exemption power, despite its obvious narrowness, and its inappropriate, singular focus, is being administered by the Secretary of State " . . . with special care shown for the rights of advocacy groups", as a "flexible limitation." *Br. of Pet.* at 33 and 28-34. After drawing this "flexibility" out of the air, the State goes on to claim that it is this flexibility that saves the statue, under the

case of *National Foundation v. Fort Worth*, 415 F. 2d 41 (5th Cir. 1969), *cert. den.*, 396 U. S. 1040 (1970).

Respondent has already demonstrated that the exemption power cannot, under any reasonable construction, suddenly become a so-called 'flexible' standard that accounts for all of the protected interests and considerations heretofore discussed. The State's argument also flies in the face of the authoritative construction of the power by the Maryland Court of Appeals, noted earlier, which agrees with Respondent's assertion that the focus of the power is far too narrow to account for the interests protected by the First Amendment. Therefore, the State's insistence that the exemption power saves § 103D is clearly incorrect.

Alternatively, however, Respondent asserts that even if the exemption power makes § 103D truly 'flexible', the statute would still be invalid, for two reasons.

First, although the *Fort Worth* statute was compared to the Schaumburg Code by this Court, it is by no means clear that the *Fort Worth* statute would pass muster if reviewed today. In fact, the concept of "flexible" percentage regulation was conspicuously left out of the alternative and less drastic means expressly approved by this Court in *Schaumberg*. 444 U. S. at 637-639. This is not surprising, because although a flexible regulation it may be, in a sense, less drastic (merely because more groups get to solicit funds), there is no reason to conclude that such a statute has any greater relationship to the prevention of fraud than does a rigid percentage regulation. To the contrary; because of the greater numbers soliciting, it is probably related even *less*. The

State's *post hoc* creation of flexibility within § 103D, therefore, does nothing to correct its unconstitutionality.

Second, even accepting both of the State's assumptions—that the exemption power is broad (and "flexible") enough to permit the Secretary to exempt every protected group, and that such a "flexible" scheme is less constitutionally suspect than a simple percentage regulation—Respondent asserts that an equally serious constitutional infirmity is created: excessive discretion in the hands of the Secretary. In other words, by trying to read too much into the one-sentence exemption power, making it account for the myriad of advocacy and informational considerations referred to earlier, but without the slightest hint of the standards to be applied in evaluating them, the State has traded overbreadth for excessive discretion and vagueness.

The problem of excessive discretion is repeatedly highlighted by the State in its brief. While Respondent has argued that the Secretary's exemption power is well defined and narrow (and therefore insignificant to overbreadth), the State makes extravagant claims as to how the Secretary can use the power to exempt every protected organization in the state, thus saving the statute.

For example, the State claims that the statute does not "chill" the exercise of First Amendment rights, since groups ". . . can quite easily apply for an exception to the percentage limitation and *probably* obtain one . . ." ***Br. of Pet.*** at 24 (emphasis supplied). Such a claim, whether or not it refutes the overbreadth argument, places an organization squarely into the position of having its First

Amendment rights rest solely upon the unguided discretion of the Secretary of State.[15] As stated by this Court in *Schneider, supra,* 308 U. S. at 164, where the "liberty to communicate with the residents of the town depends upon the exercise of the officer's discretion", the statute is unconstitutional. See also *Cantwell v. Connecticut,* 310 U. S. 296 (1940).

Conversely stated, the "expanded" version of the exemption power fails the test in *Hynes, supra,* 425 U. S. at 617:

> "A narrowly drawn ordinance that does not vest in municipal officials the undefined power to determine what messages residents will hear may serve these important [governmental] interests without running afoul of the First Amendment."

The fact that a permit is not technically required in advance under §103D does not change this result. An organization must conform to the statute whenever it solicits funds, and, in any event, there is little difference between a "permit" and a "registration approval".[16] This Court will not force groups to act at their peril, or even to hold their rights in abeyance while the Secretary rules on their exemption request.

> "Stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; man may the less be re-

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[15] Of course, we mean "unguided" in the advocacy and informational activity sense. Respondent has repeatedly pointed out that as to the *ability to raise funds*, the Secretary's decision is guided. Unforunately, that is the wrong criterion under *Schaumburg*.

[16] See Note 10, *supra*.

> quired to act at his peril here, because free dissemination of ideas may be the loser." *Smith v. California*, 361 U. S. 147, 151 (1959), quoted in *Hynes, supra*, at 620.

Statutes that confer excessive discretion on officials, like § 103D, at best tend to produce both arbitrary enforcement and judicial determination. At worst, they present a great danger that hostility to the views expressed or represented by the actor will be a major factor in the enforcement decision. Thus, the mere existence of a vague statute, with its standardless exemption, can serve as a vehicle for content-based restrictions on First Amendment freedoms, regardless of the fact that the statute is facially content-neutral. *NAACP v. Button, supra.*

> "The existence of such a statute, which lends itself to harsh and discriminatory enforcement by local officials, against particular groups deemed to merit their displeasure, results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview." *Thornhill v. Alabama*, 310 U. S. 88, 97 (1940).

**It bears repeating that it is the mere *existence* of a vague or excessively discretionary statute that is repugnant to the First Amendment, not whether it has actually been abused. This is the "chilling effect" doctrine: a statute that would be sufficiently precise in a non-First Amendment context is excessively discretionary within that context, because of the possibility that borderline expression will be curtailed for fear that one would be within the statute's proscription, and therefore subject to the pain and expense of prosecution, or at least the expense of proving that one's expression was indeed protected.**

In other words, the mere existence of such discretion results in the danger that unguided officials will tend to engage in arbitrary or censor-like enforcement, so that the statute becomes a *de facto* content-based regulation. We do not, of course, imply that the Secretary has or will engage in such enforcement.[17] However, actual abuse of the power is not the true danger. Again from *Thornhill, supra*:

> "[Local discretion] is pernicious not merely by reason of the censure of particular comments, but by reason of the threat to censure comments. . . . It is not merely the sporadic abuse of power by the censor but the pervasive threat *inherent in its very existence* that constitutes the danger to freedom of discussion." 310 U. S. at 97 (emphasis supplied).

In *Cantwell, supra*, charitable solicitors were convicted under a state statute requiring approval for such solicitation. This Court held that the discretion vested in enforcement officials rendered the statute invalid as a restraint on the free exercise of religion. 308 U. S. at 305. The opinion in *Schaumburg* expressly acknowledged that *Cantwell* also applies to "interests protected by the First Amendment's guarantee of freedom of speech." 444 U. S. at 629.

Respondent asserts, therefore, that the complete lack of guidelines or standards due to the State's overly broad construction of the §103D would render the statute impermissibly vague in any context; *a fortiori*, the statute is unconstitutional in a First Amendment context, where

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[17] There is no reason to doubt the statement that ". . . exemptions have been freely granted." *Br. of Pet.* at 24.

even greater specificity is required. *Hynes, supra,* 425 U. S. at 620.

It could be objected that the infirmities of overbreadth and vagueness leave the states with no way to regulate charitable solicitations. Rigid limitations, while sufficiently precise, will always be overbroad, as in *Schaumburg.* Placing exemptions in the statute, to be administered by state officials will protect some interests, but such provisions are likely to be excessively discretionary. It seems that the combination of *Schaumburg* (as to overbreadth) and *Hynes* (as to discretion) "relegates any local government interested in regulating door-to-door activities to the role of Sissyphus." *Schaumburg, supra,* 444 U. S. at 639, Rehnquist, J., dissenting.

The answer to this objection is found in *Schaumburg* itself. A state may enforce only ". . . narrowly drawn regulations designed to serve [state] interests without unnecessarily interfering with First Amendment freedoms." 444 U. S. at 637 (citations omitted).

Clearly, as we have argued, §103D cannot be transformed into a "flexible" statute by the State's broad interpretation and still adhere to the requirement of precision. To reiterate, it is no answer to the objection of overbreadth to create excessive discretion in the hands of a state official, for such an answer is itself objectionable.

Respondent does not argue that the State of Maryland cannot regulate in this area. The argument is that any statute, to be able to regulate solicitation, must be narrowly and precisely drawn. It must establish substantive guidelines for the Secretary of State (not merely fundraising ability standards, or accounting standards) to enable her to properly exempt those organizations

whose activities are protected, but it cannot leave excessive discretion in her hands. It may be possible to create an exemption power that would meet this burden, however, the Maryland legislature certainly did not do so.

In fact, it is absurd to suggest that the State's expanded exemption power in §103D even approaches this level of precision. It is, in fact, excessively discretionary. It amounts to the circularity of a rule stating that the Secretary may grant an exception if the organization is entitled to one.

The State argues that such discretion, by allowing exemptions to many groups, promotes First Amendment interests. Respondent disagrees. The power to grant an exemption carries with it the power to deny one. Therefore, whether read narrowly or broadly, the exemption power does not save §103D from unconstitutionality.

## CONCLUSION

For all of the reasons set forth herein, the decision of the Court of Appeals of Maryland, holding Article 41, Section 103D of the Maryland Code unconstitutionally overbroad under the First and Fourteenth Amendments, should be affirmed.

Respectfully submitted,

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